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LIABILITY OF LIVE STOCK CARRIERS.

It is proposed in this essay to examine the authorities indicating the liability of railway and other public carriers for injuries to sheep, hogs, horses, cattle and live stock, generally while in transit on railways, canals or other public highways.

I. Generally.—It may be laid down as a general rule, sustained by the weight of authority, that, when railway companies, steam or canal-boat proprietors, or other persons or companies which operate conveyances over railroads, canals or other public highways, receive live stock to be transported by them, such companies assume, as to such live stock, all the responsibility of common public carriers: *K. P. Railroad Co.* v. *Nicholas*, 9 Kans. 235; *McCoy* v. *K. & D. M. Railroad Co.*, 44 Iowa 424; *St. L. & S. E. Railroad Co.* v. *Dorman*, 72 Ill. 504; *O. & M. Railway Co.* v. *Dunbar*, 20 Id. 623; *Kimball* v. *R. & B. Railway Co.*, 26 Vt. 247; *German* v. *C. & N. W. Railway Co.*, 38 Ia. 127; *Wilson* v. *Hamilton*, 4 Ohio St. 722; *A. & N. Railroad* v. *Washburn*, 5 Neb. 117; *Palmer* v. *G. J. Railway Co.*, 4 M. & W. 749; *Shaw* v. *G. S. & W. Railroad Co.*, 8 L. R. (Ireland) 10; *Powell* v. *Penn. Railway Co.*, 32 Penn. St. 414; *Rixford* v. *Smith*, 52 N. H. 355; *Louisville, &c., Railroad Co.* v. *Hedger*, 9 Bush 645; *Rhodes* v. *Railroad*, Id. 688; *Welsh* v. *Railroad*, 10 Ohio St. 72; *Evans* v. *Railroad*, 111 Mass. 142; *Hall* v. *Renfro*, 3 Met. (Ky.) 51; *Conger* v. *Railroad*, 6 Duer 375; *Harris* v. *Railroad*, 20 N. Y. 232; *T., W. & W. Railway Co.* v. *Hamilton*, 76 Ill. 393;

Toledo, &c., Railroad Co. v. *Thompson*, 71 Id. 434; *Squire* v. *Railroad*, 98 Mass. 239; *Kimball* v. *Railroad*, 26 Vt. 247; *South., &c., Railroad* v. *Henlein*, 52 Ala. 606; *Smith* v. *Railroad*, 12 Allen 531; *Kansas, &c., Railroad Co.* v. *Reynolds*, 8 Kans. 623; *Clarke* v. *Railroad*, 14 N. Y. 570; *Penn* v. *Railroad*, 49 Id. 204; *Cragin* v. *Railroad*, 51 Id. 61; *Betts* v. *Farmers' Loan Co.*, 21 Wis. 80; *Evansville, &c., Railroad Co.* v. *Young*, 28 Ind. 516; *Ballentine* v. *Railroad*, 40 Mo. 491; *I. C. Railroad Co.* v. *Hall*, 58 Ill. 409; *Lee* v. *Railroad*, 72 N. C. 236; *Sager* v. *Railroad*, 31 Me. 228. The common-law liability of a public carrier to safely carry and deliver live animals, is not different from his liability as to the carriage and delivery of merchandise or other dead matter: *St. L. & S. E. Railway Co.* v. *Dorman*, 72 Ill. 504. The fact that the transportation of cattle is not the principal business of a railway company, does not render it any less liable as a common carrier of live stock: *Kimball* v. *R. & B. Railway Co.*, 26 Vt. 247. This rule applies to a ferryman: *Wilson* v. *Hamilton*, 4 Ohio St. 722.

The fact that a railway company has leased its road does not relieve it from liability as a common carrier, for damages to stock shipped over its road while it is in the hands of the lessee, especially where the power to lease is not expressly conferred by the charter: *O. & M. Railway Co.* v. *Dunbar*, 20 Ill. 623. Even if a railway company be not liable as a common carrier, as an insurer of the stock carried, it must at least exercise ordinary care in its employment: *German* v. *C. & N. W. Railroad Co.*, 38 Iowa 127. The company is liable even before the stock is actually placed on board of its cars. Thus where a shipper placed his stock in a pen belonging to the company which had been freshly lime-washed, and the lime wash injured the stock, the company were held liable: *Shaw* v. *G. S. & W. Railway Co.*, 8 L. R. (Ireland) 10. A company has been held liable as a common carrier for horses injured or killed in transit: *Palmer* v. *G. J. Railway Co.*, 4 M. & W. 749; *St. L. & S. E. Railroad Co.* v. *Dorman*, 72 Ill. 504; for the value of a mare which was placed in a horse box to await being put aboard the cars, and while in the box got her foot in a manger, slipped, and was strangled: *Moffat* v. *G. W. Railway Co.*, 15 L. T. (N. S.) 630; for permitting straw to be used in such a manner that it caught fire and injured stock: *Powell* v. *Penn. Railway Co.*, 32 Penn. St. 414.

If the agent of the company stand by and permit the cars to be overloaded, it is liable: *Ritz* v. *Penn. Railroad Co.*, 3 Phila. 82. But where the shipper agreed to load and unload the stock, the company to furnish assistance, the company's obligation to assist relates to the loading and unloading at the termini, and not at intermediate stations, and it was decided that if the company decline to help unload the stock at an intermediate station while the train was delayed by a snow storm and damage ensued, it was not liable: *Penn* v. *B. & E. Railroad Co.*, 49 N. Y. 204. See also *O. & M. Railroad Co.* v. *Dunbar*, 20 Ill. 623.

There are, however, cases in which courts have decided that railway companies are not common carriers of live stock. The Supreme Court of Michigan has taken this view—Judge CHRISTIANCY holding that cattle being in their nature much more liable to injury and loss in transportation than property generally transported by that mode of conveyance, imposing greater risks, of a different character, demanding more labor and special arrangements for their protection, do not come within the reasons which by the common law imposed upon common carriers, the obligation to receive and transport, and the duty of care and custody of the property, and made them insurers against loss or injury. See *M. S. & N. I. Railroad Co.* v. *McDonough*, 21 Mich. 165. *Contra*, see *Kans. Pac. Railroad Co.* v. *Nichols*, 9 Kan. 235. This view is contrary to the clear preponderance of authority and is not the law.

II. INHERENT VICE.—A railway or other carrier is not responsible for an injury to animals caused by their fright, bad temper or other inherent vice which produces injury without fault of the carrier. So held where a bullock while being properly loaded into a suitable car escaped and was subsequently found dead on the railway track: *G. W. Railroad Co.* v. *Blower*, 41 L. J. C. P. 268; see also *Smith* v. *New H. & H. Railway Co.*, 12 Allen 531; *Evans* v. *Fitchburg Ry. Co.*, 111 Mass. 142; *Hall* v. *Renfro*, 3 Met. (Ky.) 51. And where a delay is caused by the act of third persons, without any negligence of the carrier, the restiveness of the stock, occasioned by such delay and their trampling upon each other, must be deemed to be the consequence of the nature and inherent character of the animals and the carrier is not responsible for injuries thus caused: *Conger* v. *Hudson R. Railroad Co.*, 6 Duer 375.

III. CARE DURING TRANSIT.—As remarked by Judge CHRISTI

ANCY (*M. S. & N. I. Railroad Co.* v. *McDonough*, 21 Mich. 165), railway transportation is a "mode of conveyance at which, from their nature and habits, most animals instinctively revolt; and cattle especially, crowded in a dense mass, frightened by the noise of the engine, the rattling, jolting, and frequent concussions of the cars, in their frenzy, injure each other by trampling, plunging, goring, or throwing down, and frequently, on long routes, their strength exhausted by hunger and thirst, fatigue and fright, the weak easily fall and are trampled upon, and unless helped up, must soon die. Hogs also swelter and perish. It is a mode of transportation which but for its necessity would be gross cruelty, and indictable as such."

Of late years, however, the risk and suffering of animals during transit have been greatly mitigated by reasonable unloading, resting, feeding and watering. Many kinds of stock cars, appliances to feed and water stock *en route*, and other inventions tending to ameliorate the discomforts of animals while travelling have been made. Both state and federal governments have enacted laws having this object in view. A statute (Rev. Stat. U. S. §§ 4386–4390) providing that no common carrier of cattle, sheep, swine, or other animals from one state to another shall confine them in cars, boats or vessels for a longer time than twenty-eight consecutive hours, without unloading them for rest, water and feeding for a period of at least five consecutive hours, under a penalty, is constitutional. The confinement of each animal for twenty-eight hours is not an offence, within the statute, but only the confinement for that time of the whole number of animals in the shipment: *United States* v. *Bost. & Alb. Railroad Co.*, 15 Fed. R. 209. And this statute only applies to interstate shipments of cattle, not to those between points within the same state: *United States* v. *E., T. V. & G. Railroad Co.*, 9 Am. & Eng. R. R. Cas. 259.

But irrespective of any statute it is the duty of a railway company which accepts stock for transportation to take reasonable care of it, and if for want of such care, loss ensues, the company will be liable to the owner. It is as much the duty of a railway company to provide water at suitable points on the line of its road for the use of stock as it is its duty to carry such stock, and it will be liable if hogs or other stock die for want of water to drink: *T. W. & W. Railroad Co.* v. *Hamilton*, 76 Ill. 393, or for want of proper application of water when they are sweltering and dying from

heat. It is gross negligence on the part of the company not to apply water in such a case. It is not contributory negligence on the part of the shipper accompanying them not to water hogs or drench them at a given station on the route if, when there, they are doing well and not suffering for want of water. If the water is scarce at the next place where the hogs are likely to want it, then the company should inform the shipper of the scarcity, so that he may guard against it. Its failure so to do is gross negligence; indeed, it is the duty of the company to inform the shipper of a scarcity of water on its route before he ships, and negligent for it not to do so: *T. W. & W. Railroad Co.* v. *Thompson*, 71 Ill. 434. In case the train is, from any cause, stopped, the carrier having control of it is responsible for any injury to the cattle caused by their not being watered, after refusing to allow the owner to take them out of the cars and water them. The owner is not required to demand that the train proceed, nor to persist in attempting to water the stock until forcibly resisted: *Harris* v. *N. Ind. Railroad Co.*, 20 N. Y. 232. If the conductor refuse to apply water to overheated hogs the company is liable notwithstanding a contract that its liability should be limited to such damages as might result from collision or derailment: *I. C. Railway Co.* v. *Adams*, 42 Ill. 474. And the fact that live stock was consigned by mistake to the wrong place will not relieve the carrier from liability for damages for neglecting them at such place: *Bryant* v. *S. W. Railway Co.*, 68 Ga. 805; s. c. 6 Am. & Eng. R. R. Cas. 388.

IV. DEFECTIVE CARS.—A shipper has a right to expect that the cars furnished for the transportation of his stock will be reasonably suitable for the business, and he may recover for any loss or damage occasioned by their unfitness: *Hawkins* v. *G. W. Railway Co.*, 17 Mich. 57; see also *Rhodes* v. *L. & N. Railroad Co.*, 9 Bush 688, and cases *infra*. Especially is this true where he calls attention to any apparent defect and the company promises to repair it. The rule holds good, too, even where the shipper stipulates to assume all risks himself. Thus a railway company has been held liable for the loss of cattle which dropped from the car in transit by reason of a defective door: *Welsh* v. *Pitts. Ft. W. & C. Railroad Co.*, 10 Ohio St. 65; so held, also, where the animals escaped through a defective window in the end of the car. In this case the person in charge of the stock told the conductor of the broken window, after one of the animals had escaped, and subsequently fixed the

window himself, the conductor not doing so: *I. P. & C. Railroad Co.* v. *Allen*, 31 Ind. 394. So held also, where the bottom of the car dropped out and the cattle were injured: *G. W. Railroad Co.* v. *Hawkins*, 18 Mich. 427. So, too, where there was an insufficient chute for loading the stock: *L. C. & L. Railroad Co.* v. *Hedger*, 9 Bush 645.

But a release from all claims, demands and liabilities has been held to cover damages caused by cattle dropping out of a car through a door negligently left open: *Mynard* v. *S. B. & N. Y. Railroad*, 7 Hun 399. And an "owner's risk" note or ticket has been held to relieve the carrier from liability for damage to horses or cattle in transit caused by the concussion or defects in the construction of cars: *Chippendale* v. *L. & Y. Railroad Co.*, 21 L. J. (Q. B.) 22; *Gannell* v. *Ford*, 5 L. T. (N. S.) 604; *G. N. Railway Co.* v. *Morville*, 21 L. J. (Q. B.) 319. A railway company acting as a common carrier of live stock is liable for damage resulting from defective and unsafe cars, notwithstanding an express contract to the contrary: *Welsh* v. *Pittsburgh, Ft. W. & C. Railroad Co.*, 10 Ohio St. 65; *I. B. & W. Railroad Co.* v. *Strain*, 81 Ill. 504. And the carrier is liable although animals are unruly and vicious, where the accident is caused by a defect in the car: *Smith* v. *New H. & N. Railway Co.*, 12 Allen 531; *Rhodes* v. *L. & N. Railroad Co.*, 9 Bush 688. The obligations of the carrier to furnish suitable cars, for the transportation of live stock, is absolute, without reference to the fitness or fidelity of officers, and the company is liable unless the shipper, with notice of the defect, assented to the use of the cars: *Gt. W. Railway Co.* v. *Hawkins*, 18 Mich. 427. If the bottom of the car have a hole in it and a horse breaks its leg therein the company is liable: *Combe* v. *L. & S. W. Railroad Co.*, 31 L. T. (N. S.) 613. And where a shipper was shown two kinds of cars and chose those having two defects, one palpable and visible, the other, spikes sticking out inside the car, and not visible except upon entering the car and examining it, it was decided that the company were liable for an injury resulting from such spikes, and that to exonerate itself the company must show that invisible, impalpable defects were pointed out, and that the shipper was not obliged to enter the car and search for them: *Harris* v. *N. Ind. Railroad Co.*, 20 N. Y. 232. But where hogs were shipped in cars of another company selected by the shipper, who refused to ship in the cars of the defendant company, it was held

that if the hogs escaped by reason of any defect in the cars, or of the door fastenings thereof, the defendant was not responsible if it did know of such defects when the shipper selected the cars: *I. C. Railroad Co.* v. *Hall*, 58 Ill. 409. And where the owner of the stock knew of a defect in the car doors but did not inform the carrier, he failed to recover for the stock which escaped from the car in consequence of such defect: *Betts* v. *F. L. & F. Co.*, 21 Wis. 80.

V. DELAYS. CARRYING BEYOND DESTINATION.—A railway company carrying stock beyond its destination must give them reasonable care and attention after passing the destination, although the shipper contracted with the company that it was not to be responsible for attention, feeding, or watering the stock, but that it should afford the shippers reasonable facilities: *Bryant* v. *S. W. Railroad Co.*, 68 Ga. 805; 6 A. & E. R. Cas. 388. Where stock were carried beyond their destination and in consequence of delay they could not be brought to their intended market and they were injured by being kept several hours in the cars without food or water, the company was held liable notwithstanding a contract that "the company are not liable for any consequences arising from detention or delay in, or in relation to the conveying or delivery of the said animals, however caused," such condition being unreasonable within the meaning of the Railway and Canal Traffic Act of 1854 (England): *Allday* v. *G. W. Railroad Co.*, 5 B. & S. 903, 11 Jur. (N. S.) 12. Where the agreement was that "the company will in no case be responsible for any damage to live stock arising from overcrowding any wagon, or for the delivery of cattle or live stock, at any particular time or any particular market." *Held*, that such stipulation did not qualify the implied contract to deliver within a reasonable time, but only prevented the question of reasonable time from being affected by the express wish of the consignor to have his cattle delivered at a particular time or for a particular market: *Mathews* v. *D. & D. Railway Co.*, 17 Irish C. L. 87. Where the freight on cattle was prepaid, but the receiving agent of the company was, by neglect, not informed of this, and refused for two days, during which time the cattle were damaged by exposure and delay, to deliver them, the company was held liable for damages for the delay notwithstanding a stipulation by which the company were to be relieved from all loss, detention or injury to the cattle

in receiving or forwarding, except that arising from the wilful misconduct of their servants: *Gordon* v. *G. W. Railroad Co.*, 45 L. T. 509.

But where a contract was signed exonerating the company from liability from damages done to any horses conveyed, and the company's employees either forgot or failed to notice the arrival of the horse, which suffered serious injury from cold and confinement, not being called for until next day, the carrier was held not liable; and it was intimated that the company would not be liable independently of the special contract, the owner not being ready to receive the horse: *Wise* v. *G. W. Railroad Co.*, 25 L. J. (Exch.) 258. And where the company proved that it carried and delivered the stock as expeditiously as its arrangements to carry and deliver stock would admit, it was held not liable for delay, there being a special contract that it would not be responsible for the delivery of stock "within any certain or definite time, nor in time for any particular market:" *Hughes* v. *G. W. Railway Co.*, 23 L. J. (C. P.) 153.

It is undoubtedly true that it is the duty of railway carriers to furnish suitable and sufficient cars to carry traffic. But in *Kirby* v. *G. W. Railroad Co.*, 18 L. T. 658, it was said that the railway company were not bound by the representations of its agent to the effect that a shipper could have cars so as to ship live stock by a specified train, and was not liable for delay consequent upon not furnishing the cars. In *I. C. Railroad Co.* v. *Owens*, 53 Ill. 391, a shipper of hogs released the company from liability for loss "by delay of trains or any damage said property might sustain, except such as might result from a collision of a train, or when cars were thrown from the track in the course of transportation." One car was derailed, but the cars containing the hogs all remained on the track. It was decided that the company were liable for whatever hogs were lost, or for whatever shrinkage occurred by reason of the delay caused by the accident, although it was held not liable for injury resulting from additional delay caused by excessively cold weather (*I. C. Railroad Co.* v. *Owens*, 53 Ill. 391), or from a snow-storm (*Ritz* v. *Penn. Co.*, 3 Phila. 82).

It is the duty of a railway carrier to show no partiality or unjust discrimination in the time of forwarding freight. "First come first served," is the rule they are required to obey. In *Page* v. *G. N. Railroad Co.*, 2 Irish C. L. R. 228, it was the usage of the

company, and known to the shipper, to carry cattle in the order in which they arrived in its yards. Plaintiff came with his in the night, but, finding the company's porter sick, withdrew with his cattle until morning. Under the circumstances the booking-clerk booked the cattle before they came into the yard. In the meantime other cattle came into the yard before plaintiff returned with his stock, and were shipped ahead of his. Held, that the company were bound by the act of the clerk and liable for the delay: *Page* v. *G. N. Railroad Co.*, 2 Irish C. L. R. 228. Where a train arrives between ten and eleven o'clock at night, and should have taken the cars of cattle on with it but did not do so, it is not a lack of diligence on the part of the owner of live-stock therein not to remove them until at nine o'clock the next morning. He is not under obligation to take them out at night in order to prevent their injury from confinement. Where cattle are placed in cars provided for them by a railroad company in time to be taken by the next regular cattle train, andthe agent at the place of shipment knows that they are ready for transportation, it is the company's duty to take them by such train, and it is liable for injury caused by delay resulting from its neglect to do so: *I. C. Railroad Co.* v. *Waters*, 41 Ill. 73.

But while a shipper of stock is entitled to rely upon its being carried in proper time, and the company is liable for its negligent failure to do so (*Harris* v. *N. Ind. Railroad Co.*, 20 N. Y. 232), yet the carrier is not liable for shrinkage in weight during the transit if every reasonable effort has been made to deliver the cattle in reasonable time: *O. & M. Railroad Co* v. *Dunbar*, 20 Ill 623. Nor is it liable for delay resulting from a collision caused by another company: *Conger* v. *Hudson R. Railroad Co.*, 6 Duer 375. Nor for delay caused by a change in its running time of trains, even though such trains be not publicly announced: *Ballands* v. *M., S. & L. Railroad Co.*, 15 Irish C. L. 560.

VI. MISCELLANEOUS INSTANCES.—Where the company negligently failed to provide suitable appliances to put out a fire which caught in the bedding of some sheep in transit, it was held liable for the damage notwithstanding a stipulation that it should not be liable for injuries resulting from the burning of straw, hay or any other material used for feeding the animals or otherwise: *Holsapple* v. *R., W. & O. Railroad Co.*, 86 N. Y. 275. So where employees of the company, although cautioned not to do so, let a cow out

of a car upon the line and she was killed: *Gill* v. *M., S. & L. Railroad Co.*, 42 L. J. (Q. B.) 89. But where a contract of shipment of live-stock by which the owner was to assume all risks for injury done by the cattle to each other, and also that the owner would be permitted to pass with them on the train, was not signed until four hours after the cars had been shipped, it was decided that it was a nude pact and did not relieve the company of responsibility: *German* v. *C. & N. W. Railroad Co.*, 38 Iowa 127. A release from all liability for damages is no bar to a recovery for injuries caused by negligent overloading: *Ritz* v. *Penn. Railroad Co.*, 3 Phila. 82. A railway company is liable too for injuries resulting from not providing a safe place to unload stock, notwithstanding a release from all liability, and although a pass was given the person travelling in charge of the stock: *Rooth* v. *N. E. Railway Co.*, L. R., 2 Ex. 173. A special contract giving the stock owner a pass, and providing that he should feed, water, load and unload the stock at his own risk, does not confer on him the power to decide when, where or under what circumstances such loading and unloading shall take place. It is his duty to load and unload whenever and wherever necessary, according to the exigencies of the transportion: *McAllister* v. *C., R., I. & P. Railroad Co.*, 74 Mo. 351. But where in consideration of a reduced rate a shipper agreed to assume the risk of injuries to animals "in consequence of heat, suffocation or being crowded," to load and unload the animals at his own risk, to examine the cars on which they were carried, and to go or send some one on the train to care for the animals, it was decided that the owner could not recover for injuries resulting from overcrowding and suffocation, although he permitted the company's employees to load and unload the cars without objecting to overcrowding till the train was ready to start, and then not to the proper persons, and although he did not sign the special contract until after the train started: *Squire* v. *N. Y. C. Railroad Co.*, 98 Mass. 239. See also, *Pardington* v. *S. W. Railroad Co.*, 2 Jur. (N. S.) 1210; 1 H. & N. 392.

VII. LIMITATION OF LIABILITY.—There is some conflict of authority upon the point whether a railway company may limit its liability for negligence, and each case involving this question is to be decided by reference to the law as laid down by the local court of final resort. The rule as laid down in most states however is against limiting liability so as to cover carrier's negligence

and its consequences. In New York it is decided that it may so limit its liability: *Maynard* v. *S. B. & N. Y. Railroad Co.*, 7 Hun 399; *Lee* v. *Marsh*, 28 How. Pr. 275; *Penn* v. *B. & E. Railroad Co.*, 49 N. Y. 204. In Wisconsin it has been decided that a common carrier of live stock may contract that the owner shall assume all risk of damage from whatever cause in course of transportation: *Betts* v. *Farmers' L. & T. Co.*, 21 Wis. 80.

Many cases present adjudications upon particular instances of limitation of liability by special contract. A contract of a shipper assuming all risks of injuries arising "from delays or in consequence of heat, suffocation or the ill effects of being crowded upon the cars," is valid, and the shipper must bear his own losses unless caused by the carrier's wilful act or neglect: *Penn* v. *B. & E. Railroad Co.*, 49 N. Y. 204. An agreement, in consideration of a reduced rate and a pass, that the owner will attend to the live stock and care for it at his own expense in case of accident, is reasonable and valid. The carrier, if not wanting in the diligence required of him is not liable for loss occasioned by the shipper's inattention: *S. & N. Ala. Railroad Co.* v. *Hanlein*, 52 Ala. 606. A contract to carry live stock, but exempting the carrier from responsibility for losses and damages "in loading, unloading, conveyance, and otherwise," whether caused by negligence or misconduct, or anything else, does not exempt the carrier from the necessity of furnishing suitable cars. The exemption must be confined to risks in the use of the proper means of transportation which every one may assume are possessed by the carrier: *Hawkins* v. *Great W. Railroad Co.*, 17 Mich. 57. Though a contract is made exempting the carrier from liability except for gross negligence in not attending to live stock, yet if it carries the stock beyond the agreed destination and there keeps them for a time its liability as to such time is not limited to the results of gross negligence: *Bryant* v. *S. W. Railway Co.*, 68 Ga. 85; 6 Am. & Eng. R. R. Cas. 388. And the general rule is as above stated. A railway company cannot limit its liability for negligence: *Welsh* v. *P., F. W. & C. Railroad Co.*, 10 Ohio St. 65. In Iowa such limitation is contrary to the code (sec. 1308): *McCoy* v. *K. & D. M. Railroad Co.*, 44 Ia. 424. Where live stock was shipped under a special contract that the company is "hereby released from all liability for damages of whatsoever kind that may happen during the transit. This company do not assume to transport stock in any given time," it was decided that the company could

limit its liability only to the same extent and by the same means as in the transportation of other property, and that the above contract could not relieve against negligence in delivering the stock: *K. P. Railroad Co.* v. *Reynolds*, 8 Kan. 623. A contract limiting liability, but silent as to the fitness of cars, does not release from defective cars: *G. W. Railroad Co.* v. *Hawkins*, 18 Mich. 427.

Many clauses in carrier's special contracts to limit liability have been expressly pronounced unreasonable. So decided of a clause exempting the carrier from liability for delay, or injury "however caused": *Kirby* v. *G. W. Railroad Co.*, 18 L. T. 658; *McManus* v. *L. & Y. Railroad Co.*, 28 L. J. (Ex.) 353; *McCance* v. *L. & N. W. Railroad Co.*, 34 Id. 39; 31 Id. 65; *Lloyd* v. *W. & L. Railroad Co.*, 15 Ir. C. L. 37; *Gregory* v. *W. M. Railway Co.*, 2 H. & C. 944; 33 L. J. (Exch.) 155; 12 W. R. 528. Alternative conditions called "A" and "B," one exempting the carrier entirely from liability, and the other making it liable only where the shipper pointed out the injury at delivery, have been decided unreasonable: *Lloyd* v. *L. & W. R. R. Co.*, 14 Ir. Jur. 240, 9 L. T. (N. S. 89, and see *Rice* v. *K. P. R. R. Co.*, 63 Mo. 314. A stipulation relieving a company from all liability will not release them where they carried cattle in a steamboat which the law did not authorize them to work: *Doolan* v. *Directors*, L. R., 2 App. Cas. 792. A release of liability for damages caused by negligence of the captain and crew of a connecting steamer, will not release a railway company making a through contract for carriage: *Moore* v. *M. Railway Co.*, 9 Irish C. L. R. 20.

VIII. MEASURE OF DAMAGES.—The measure of damages, in an action against a railway company for a failure to transport live animals to market and deliver them there in good condition on a certain day, is the difference between their market value there, in good condition on the day when they ought to have been delivered, and their market value here in their actual condition on the day when they were delivered: *Smith* v. *N. H. & N. Railway Co.*, 12 Allen 531; *K. P. Railway Co.* v. *Reynolds*, 8 Kans. 623; *The S. & M. Railway Co.* v. *Henry*, 14 Ill. 156. But where it usually took twenty-four hours to get a car of hogs to the place of destination, and the hogs were started in the evening of a certain day, then the price of hogs at the place of destination on the next day after should *not* be taken into consideration as the basis for

the calculation of damages. And in New York damages resulting from the loss of a market, occasioned by a delay in the delivery of live stock, have been held speculative: *Conger* v. *Hudson R. Railway Co.*, 6 Duer 375. On a contract to deliver hogs at a particular place within a certain time, the owner may recover for care and expense bestowed upon them, either during transit or after their arrival at their destination: *The S. & M. Railway* v. *Henry*, *supra*. In inter-state shipments, proof of value of live-stock at the place of destination may be considered in fixing value at place of shipment: *I., B. & W. Railway Co.* v. *Strain et al.*, 81 Ill. 504. The fact that cattle were without food, under circumstances where the owner could not properly be expected to provide it, is a proper element to enter into the calculation of damages: *Ill. Cent. Railway Co.* v. *Waters*, 41 Ill. 73. A special contract, that the value at the time and place of shipment, not to exceed fifty dollars per head, should be the measure of recovery, is reasonable, and is the measure of the carrier's liability: *The S. & N. Ala. Railway Co.* v. *Henlein*, 52 Ala. 606. A stipulation that the measure of recovery for horses should be two hundred dollars per head is binding, although one of the horses negligently killed was worth fifteen thousand dollars: *Hart* v. *Penn. Railroad Co.*, 7 Fed. Rep. 630. In England, by statute, damages for injury to a horse are limited to 50*l.*, unless at the time of delivery a greater value be declared; *Hodgman* v. *W. M. Railway Co.*, 33 L. J. (Q. B.) 233. See also, *McCance* v. *The L. & N. W. Railway Co.*, 7 H. N. 477. In *Hill* v. *L. & N. W. Railway Co.*, 42 L. T. 513, a ram was negligently injured. No declaration of value was made at the time of shipment. *Held*, that the liability was limited to the amount specified in the railway and canal traffic act. No recovery can be had for loss of profits to be derived from letting a jack to mares, when it is not avowed in the declaration and proved that the carrier was informed of the intended use of the animal: *C., B. & Q. Railway Co.* v. *Hale*, 83 Ill. 360.

A railway company failed to provide cars. The owner of valuable hunting horses, in consequence, was obliged to send them by road. Owing to their soft condition they were greatly deteriorated in appearance and injured. Hence they were sold at prices below what otherwise could have been obtained. It was decided that the company were not liable for the entire loss, but that the measure of damages was the deterioration which the horses, if in ordinary

condition and fit to make the journey, would have suffered thereby, and the time and labor expended on the road: *Waller* v. *M., G. W. (Ir.) Co.*, 4 L. R. (Ireland) 376.

Where plaintiff's cattle had been turned loose by the carrier with another lot belonging to a different firm, and some of the whole lot were lost and a gross sum paid for recapturing others; but there was no proof showing that any of the cattle lost or recovered belonged to the plaintiff, *Held*, that a charge of the court that the jury might assess plaintiff's damages *pro rata* as to the whole amount of damages as the number of plaintiff's cattle were to the whole number of cattle belonging to both firms, was erroneous: *K. P. Railway Co.* v. *Nichols et al.*, 9 Kans. 235.

IX. BURDEN OF PROOF.—If cattle are injured while being transported by a railway company, the burden of proof lies upon the company to prove that care and skill upon its part would not have prevented the injury: *McCoy* v. *The K. D. M. Co.*, 44 Ia. 424. So held in case of a loss, in consequence of cattle not being supplied with water: *T. W. & W. Railway Co.* v. *Hamilton*, 76 Ill. 393.

It is *prima facie* negligence for a railway company to allow its pumps at a station to be out of repair, so that water cannot be provided for live stock. It is for the company to explain why the pump is out of repair, and to show that it is not by their negligence: *T. W. & M. Railway Co.* v. *Thompson*, 71 Ill. 434. But in *L. C. & L. Railway Co.* v. *Hadger*, 9 Bush 645, it was held, that while the loss or injury to live stock while in the carrier's custody is *prima facie* negligence, yet if the owner agrees to load and unload the stock, and, in fact, does so, the burden of proof is upon him to show negligence. And if the carrier's liability is restricted by special contract, the burden of establishing negligence is upon the shipper: *K. P. Railway Co.* v. *Reynolds*, 8 Kans. 623.

X. EVIDENCE.—The existence of a rule established by a railway company, that shippers are not to use straw as bedding for stock, is evidence that their agent was negligent in allowing it to be used, and renders the company liable for the loss sustained: *Powell* v. *Penn. Railway Co.*, 32 Penn. St. 414. The admission to the plaintiff, made a week after delivery, as to the cause of delay, by a night inspector of the company who had charge of the train at an

intermediate station, is not admissible in evidence against the company: *Willis* v. *G. W. Railway Co.*, 12 L. T. (N. S.) 349. Hearsay evidence of the number of hogs delivered by the owner at the place of destination is not admissible: *I. C. Railway Co.* v. *Hall*, 58 Ill. 409. The fact that a shipper of stock was allowed a passage for himself on the train in which his horses were carried, does not prove conclusively, if at all, that he was to attend to their safety during the journey and that the railway company was excused from care of them: *Clarke* v. *Roch. & S. Railway Co.*, 14 N. Y. 570. While oral evidence is not admissible to alter, contradict or vary the written contract of shipment, contained in a consignment note, yet oral evidence is admissible to superadd to the contract contained in the consignment note another and different contract of shipment. Thus, where by the consignment note, live stock were agreed to be carried from A. to B., oral evidence is admissible to show a contract to carry such stock to a further point, C.: *Malpas* v. *L. & St. W. Railway Co.*, 13 L. T. (N. S.) 710. A letter from the company's agent to plaintiff, giving the reason for the delay in forwarding stock was held admissible, although a certain letter from the company's traffic manager to said agent and upon which the agent based his statements to plaintiff, was not produced: *Ruddy* v. *M. G. W. Railway Co.*, 8 L. R. (Ireland) 224. In an action against a steamboat as a common carrier, for the loss of a horse by the explosion of the boiler, alleged by the plaintiff to have been caused by racing with a rival steamer, evidence to show the good condition of the boiler is irrelevant both on the question of liability and damages: *Agnew* v. *Steamer Contra Costa*, 27 Cal. 425. And the fact that the officers and crew used extraordinary care does not excuse the company. The averment in a declaration was that a train containing live stock was stopped and permitted to stand for a long time in a piece of woods. The evidence showed that the train did stop in a piece of timber, but it further showed that it was in a cut in the road as well as in the timber. *Held*, no variance: *T. W. & W. Railway* v. *Thompson*, 71 Ill. 434.

ADELBERT HAMILTON.